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No. 17-515

IN THE
Supreme Court of the United States

CNH INDUSTRIAL N.V. & CNH INDUSTRIAL AMERICA, LLC,

Petitioners,

v.

JACK REESE; FRANCES ELAINE PIDDE; JAMES CICHANOFSKY; ROGER MILLER; GEORGE NOWLIN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF THE ERISA INDUSTRY COMMITTEE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37.2, the ERISA Industry Committee ("ERIC") respectfully moves for leave to file the attached brief as *amicus curiae* in support of petitioners. All parties were timely notified of ERIC's intent to file an *amicus curiae* brief. Counsel for petitioners consented to the filing and stated that a letter of blanket consent to all *amicus* briefs is on file with the Clerk of this Court. Counsel for respondents did not consent to ERIC's filing of an *amicus* brief, therefore making this motion necessary.

ERIC is a nonprofit organization representing many large sponsors of ERISA-covered healthcare and other employee benefits plans. ERIC's members provide benefits to millions of active employees, retired workers, and their families nationwide. ERIC is interested in ensuring that employee benefits plans are governed by clear, predictable rules, and it often participates as *amicus curiae* in cases that may impact employee benefits plan design or administration.[1]

ERIC has collective experience not shared by the parties, including experience regarding the considerations surrounding employee benefits plans. The arguments in this brief are intended to shed light

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[1] *See, e.g.*, *M&G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926 (2015); *Conkright v. Frommert*, 559 U.S. 506 (2010); *AT&T Corp. v. Hulteen*, 556 U.S. 701 (2009); *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285 (2009); *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248 (2008); *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581 (2004); *Black & Decker Disability Plan v. Nord*, 538 U.S. 822 (2003); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432 (1999); *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996).

on the question presented in ways additional to the detail already provided by petitioners' advocacy. Because ERIC believes that the attached brief would assist the Court in resolution of this case, it asks that the Court grant leave to file the attached brief as *amicus curiae*.

Respectfully submitted,

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Other Authorities

2017 Employer Health Benefits Survey,
KAISER FAMILY FOUND. AND HEALTH RESEARCH & EDUC. TRUST,
http://files.kff.org/attachment/Report-Employer-Health-Benefits-Annual-Survey-2017.....7

Caruso, Anthony,
Statistics of U.S. Business Employment and Payroll Summary: 2012, U.S. CENSUS BUREAU (Feb. 2015), https://www.census.gov/content/dam/Census/library/publications/2015/econ/g12-susb.pdf.....7

Gladwell, Malcolm,
Overdrive: Who Really Rescued General Motors?, THE NEW YORKER (Nov. 1, 2010), http://goo.gl/yLxTpC.....9

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How does UK healthcare spending compare internationally?, OFFICE FOR NATIONAL STASTICS (UNITED KINGDOM) (Nov. 1, 2016), https://visual.ons.gov.uk/how-does-uk-healthcare-spending-compare-internationally/. 8

Kontis, Vasilis, et al,
Future Life Expectancy in 35 Industrialised Countries: Projections with a Bayesian Model Ensemble, THE LANCET (Feb. 21, 2017), http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(16)32381-9/fulltext. 8

NHE Fact Sheet,
CTRS. FOR MEDICARE AND MEDICAID SERVS., https://www.cms.gov/research-statistics-data-and-systems/statistics-trends-and-reports/nationalhealthexpenddata/nhe-fact-sheet.html (last visited Nov. 11, 2017).....8, 9

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An Aging Nation: The Older Population in the United States, U.S. CENSUS BUREAU (May 2014), https://www.census.gov/prod/2014pubs/p25-1140.pdf. 7

INTEREST OF *AMICUS CURIAE*[1]

ERIC is a nonprofit organization representing the Nation's largest sponsors of ERISA-covered pension, healthcare, disability, and other employee benefits plans. ERIC's members provide benefits to millions of active employees, retired workers, and their families nationwide. ERIC often participates as *amicus curiae* in cases that may impact employee benefits plan design or administration.

Amicus seeks to ensure that voluntary employee benefits plans remain a workable feature of the American employment landscape. It advocates for policies that allow its members to offer benefits effectively, efficiently, and uniformly across the country. Here, *amicus* and its members have an interest in ensuring that collectively bargained retiree healthcare benefits are governed by predictable and uniform legal principles. Because the decision below conflicts with those of other Courts of Appeals, with other decisions within the Sixth Circuit, and with this Court's prior decision in *M&G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926, 937 (2015), *amicus* has an interest in obtaining this Court's review to restore uniformity in the law. In addition, *amicus* has an interest in ensuring that employers' retiree healthcare obligations are enforced consistently with the text of the agreements in which those benefits are offered, and that employer obligations are not

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[1] Pursuant to this Court's Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amicus*, its members, or counsel made a monetary contribution intended to fund the preparation or submission of this brief.

unpredictably expanded in ways that increase the risks of agreeing to such benefits in the first place.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court should grant the petition for certiorari and summarily reverse the decision below. That decision misapplies the rules of contract interpretation this Court set forth in *M&G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926, 937 (2015), re-opens the circuit split that case tried to "suture[] shut," *Reese v. CNH Indus., N.V.*, 854 F.3d 877, 890 (6th Cir. 2017) (Sutton, J., dissenting), and forms part of a series of Sixth Circuit cases judges on that court now admit are "in irreconcilable conflict." *UAW v. Kelsey-Hayes Co.*, 872 F.3d 388, 390–91 (6th Cir. 2017) (Griffin, J., dissenting from denial of rehearing en banc). Because the Sixth Circuit, by repeatedly denying requests for en banc review, appears unwilling or unable to bring its cases into conformity with this Court's precedent, and because the Sixth Circuit has an outsized impact on this important area of federal law, the question presented requires this Court's review.

Just over three years ago, this Court granted certiorari to resolve a circuit split regarding the interpretative rules that should apply in determining whether retiree healthcare benefits vest for life under a collective bargaining agreement. *See M&G Polymers USA, LLC v. Tackett*, 134 S. Ct. 2136 (2014) (granting certiorari in part). The Sixth Circuit, in a series of cases starting with *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (1983), had adopted a number of special inferences that tended to imply lifetime healthcare benefits when the contract on its face made no such

promise. Those so-called "*Yard-Man* inferences" were not applied by any other Court of Appeals. Resolving that circuit conflict presented an important issue of federal law, given Congress's longstanding "policy of having the administration of collective bargaining contracts accomplished under a uniform body of federal substantive law." *Smith v. Evening News Ass'n*, 371 U.S. 195, 200 (1962).

In *Tackett*, this Court unanimously "reject[ed] the *Yard-Man* inferences as inconsistent with ordinary principles of contract law." *Tackett*, 135 S. Ct. at 937. Emphasizing "the rule that contractual provisions ordinarily should be enforced as written," the Court abrogated the various rules of construction the Sixth Circuit routinely had used to imply vested benefits. *Id.* at 933, 937 (internal quotation marks omitted). The Court also set forth a number of "traditional principles" of contract law for courts to apply in determining the duration of retiree healthcare benefits, including that "contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement," *id.* at 937, and that "courts should not construe ambiguous writings to create lifetime promises," *id.* at 936.

Tackett should have ended this case. Despite the Court's clarity, it did not. In the decision below, the Sixth Circuit resurrected the *Yard-Man* inferences, using them to find that a collective bargaining agreement was ambiguous with respect to the duration of retiree healthcare benefits. *Reese*, 854 F.3d at 882–83. The Sixth Circuit then resolved that purported ambiguity in favor of lifetime vesting—just as it did in *Yard-Man* itself. *Id.* at 883.

That decision merits review, and summary reversal, for at least two reasons.

First, the Sixth Circuit's decision revives the untenable uncertainty and circuit conflict that prompted review in *Tackett*. It "abrad[es] an inter-circuit split," *id.* at 890 (Sutton, J., dissenting), as "every other court in the country would [have] handle[d] this case differently," *id.* at 893 (describing the Circuit split). In addition, the decision below furthers an intractable *intra*-circuit split. Some Sixth Circuit cases have faithfully followed *Tackett*. *See Gallo v. Moen Inc.*, 813 F.3d 265, 267 (6th Cir. 2016); *Cole v. Meritor, Inc.*, 855 F.3d 695, 699 (6th Cir. 2017). Others, such as the decision below, have sought to resuscitate the *Yard-Man* inferences and perpetuate a regime in which the Sixth Circuit's approach to these cases is badly "out of step" with those of other circuits. *See Reese*, 854 F.3d at 882–83, 893; *UAW v. Kelsey-Hayes Co.*, 854 F.3d 862, 868–71 (6th Cir. 2017). The result is "a mess" of cases in "irreconcilable conflict." *Kelsey-Hayes*, 872 F.3d at 390–91 (Griffin, J., dissenting from denial of rehearing en banc). Because forum shopping and the Sixth Circuit's geography lead to "numerous retiree healthcare cases within [its] jurisdiction," *id.* at 392, this intra-circuit uncertainty assumes outsized significance.

Employers struggling to understand the scope of their obligations, moreover, have little hope that the Sixth Circuit will fix these problems on its own. Three of the Sixth Circuit's contradictory decisions were released on the *same day* "by cooperation of all three panels." *Id.* at 388 (Gibbons, J., concurring in denial of rehearing en banc). Parties in all three cases petitioned for rehearing en banc. All three petitions

were denied. Concurring in one denial, Judge Sutton explained that despite the fact that "[b]y nearly every measure, this case deserves en banc review," such review would likely be fruitless, as "there is good reason to fear that a majority of the en banc court would fail to agree on a majority view." *Id.* at 389–90. Absent action by this Court, therefore, the uncertainties created by the Sixth Circuit will persist indefinitely.

Second, the Sixth Circuit's decision below is plainly incorrect under *Tackett*. The collective bargaining agreements in this case never promised that retiree healthcare benefits would be provided for life. To the contrary, each contract contained a durational clause that limited all benefits in the contract (not otherwise extended or shortened) to the term of the agreement. Because nothing in the retiree healthcare provisions of this contract suggested that those benefits were subject to a different time limit, the durational clause controlled and the company's obligation to provide retiree healthcare benefits expired when the contract expired.

The Sixth Circuit reached a contrary conclusion only by applying the same *Yard-Man* inferences this Court previously rejected. It refused to apply the general durational clause to retiree healthcare benefits, *Reese*, 854 F.3d at 882, an approach *Tackett* rejected as "distort[ing] the text of the agreement" and "conflict[ing] with ordinary principles of contract law," 135 S. Ct. at 936. It also found that purported "silence" in the contract as to the duration of retiree healthcare benefits "further[ed]" ambiguity, *Reese*, 854 F.3d at 882, despite *Tackett*'s clear instruction that "when a contract is silent as to the duration of

retiree benefits, a court *may not* infer that the parties intended those benefits to vest for life," 135 S. Ct. at 937 (emphasis added). And it relied on the fact that "healthcare benefits were tied to pension eligibility," *Reese*, 854 F.3d at 882–83, even though *Tackett* rejected that same logic as one of several ways in which "*Yard-Man* and its progeny affected the outcome" in that case, 135 S. Ct. at 937.

This Court should therefore grant the petition and summarily reverse the decision below. Such review is needed to bring certainty to an area of law critical to employers and retirees, both in and apart from the Sixth Circuit, and to enforce *Tackett*'s clear command that collective bargaining agreements be read according to "ordinary principles of contract law," 135 S. Ct. at 937.

ARGUMENT

I. The Sixth Circuit's post-*Tackett* Case Law Has Created Uncertainty Regarding the Vesting of Collectively Bargained Retiree Healthcare Benefits.

A. The Interpretation of Collectively Bargained Retiree Healthcare Plans is an Issue of Great Importance to the Nation's Employers.

Retiree healthcare plans remain highly significant for many large employers. A recent survey of the Kaiser Family Foundation found that approximately 25% of employers with 200 or more employees offer some form of retiree health benefits.[2] While public-

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[2] See *2017 Employer Health Benefits Survey*, KAISER FAMILY FOUND. AND HEALTH RESEARCH & EDUC. TRUST, at 173,

sector and non-profit employers are most likely to offer benefits, 11% of large for-profit enterprises also do so, and retiree benefits grow more common with workforce size and union participation.[3] Indeed, employers provide collectively bargained retiree healthcare benefits to millions of people each year.[4] These employers include numerous well-known companies with large workforces, including Caterpillar, Whirlpool, General Electric, and many others.[5]

Covering so many employees is an increasingly expensive endeavor. Rising costs are partly attributable to the fact that the United States is an aging country. While 9.8 percent of our population was over age 65 in 1970, that figure reached 13 percent in 2010, and will exceed 20 percent by 2030.[6] Over 43 million Americans were over 65 years old in

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http://files.kff.org/attachment/Report-Employer-Health-Benefits-Annual-Survey-2017.

[3] *Id.*

[4] *See* Anthony Caruso, *Statistics of U.S. Business Employment and Payroll Summary: 2012*, U.S. CENSUS BUREAU, at 1 (Feb. 2015), https://www.census.gov/content/dam/Census/library/publications/2015/econ/g12-susb.pdf (noting that 59.9 million people worked in private sector companies with 500+ employees in 2012).

[5] *See, e.g.*, *Kerns v. Caterpillar Inc.*, 144 F. Supp. 3d 963, 965 (M.D. Tenn. 2015); *Zino v. Whirlpool Corp.*, 47 F. Supp. 3d 561, 565 (N.D. Ohio 2014); *IUE-CWA v. Gen. Elec. Co.*, No. 4:15CV2301, 2017 WL [illegible] at *3 (N.D. Ohio July 28, 2017).

[6] Jennifer M. Ortman, et al, *An Aging Nation: The Older Population in the United States*, U.S. CENSUS BUREAU, at 2-3 (May 2014), https://www.census.gov/prod/2014pubs/p25-1140.pdf.

2012. By 2050, over 83 million will be.[7] Life expectancies are also climbing. While life expectancy at birth hovered around 70 in 1960 and 1970, Americans born in 2015 are projected to live an average of 78.8 years.[8] And while 65-year olds had an average further life expectancy of 15.2 years in 1960, similar individuals now survive 19.4 years.[9] These numbers will likely continue to improve, with longevity expected to incrementally increase through 2030.[10]

The per-person cost of medical care in the United States is also strikingly high. In 2015, the United States spent an estimated $9,990 per person on health care,[11] more than twice the per-capita outlays in the United Kingdom.[12] Those costs are unlikely to go down: American healthcare expenditures, and their

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[7] *Id.* at 16.

[8] *Health, United States, 2016: With Chartbook on Long-Term Trends in Health*, U.S. CTRS. FOR DISEASE CONTROL, at 116, Table 15 (May 2017), https://www.cdc.gov/nchs/data/hus/hus16.pdf.

[9] *Id.*

[10] Vasilis Kontis, et al, *Future Life Expectancy in 35 Industrialised Countries: Projections with a Bayesian Model Ensemble*, THE LANCET (Feb. 21, 2017), http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(16)32381-9/fulltext.

[11] *NHE Fact Sheet*, CTRS. FOR MEDICARE AND MEDICAID SERVS., https://www.cms.gov/research-statistics-data-and-systems/statistics-trends-and-reports/nationalhealthexpenddata/nhe-fact-sheet.html (last visited Nov. 11, 2017).

[12] *How does UK healthcare spending compare internationally?*, OFFICE FOR NATIONAL STASTICS (UNITED KINGDOM) (Nov. 1, 2016), https://visual.ons.gov.uk/how-does-uk-healthcare-spending-compare-internationally/.

implications for employers, are projected to grow faster than inflation through 2025.[13]

In an era of aging populations and ever-increasing healthcare costs, employers must be able to predictably determine when retiree healthcare benefits provided in a collective bargaining agreement vest for life and when they do not. Indeed, the financial consequences of that question are staggering. The cost of providing lifetime healthcare benefits can easily exceed tens or hundreds of millions of dollars. *See, e.g.*, *Wood v. Detroit Diesel Corp.*, 607 F.3d 427, 428–429 (6th Cir. 2010) (CEO testifying that vested retiree healthcare liabilities "could have bankrupted the company"); *Zino v. Whirlpool Corp.*, 47 F. Supp. 3d 561, 565 (N.D. Ohio 2014) (noting $169 million present value of benefits in controversy). Such costs are substantially higher for those companies with hundreds of thousands of retirees.[14]

Given the significant costs potentially at stake, Congress has long maintained a "policy of having the administration of collective bargaining contracts accomplished under a uniform body of federal substantive law." *Smith*, 371 U.S. at 200. Uniform, predictable rules may "avoid a patchwork of different interpretations of a plan . . . that covers employees in different jurisdictions," *Conkright v. Frommert*, 559 U.S. 506, 517 (2010), and reduce "considerable inefficiencies, which the employer might choose to offset by lowering benefits levels," *Fort Halifax*

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[13] *NHE Fact Sheet*, note 11, *supra*.

[14] Malcolm Gladwell, *Overdrive: Who Really Rescued General Motors?*, THE NEW YORKER (Nov. 1, 2010), http://goo.gl/yLxTpC (noting that, as of 2007, General Motors had around 517,000 retirees).

Packing Co. v. Coyne, 482 U.S. 1, 10 (1987). Understanding which obligations are vested, and which terminate when a contract expires, is thus vital to employers' willingness to continue offering retiree health benefits in an increasingly complex marketplace.

For similar reasons, Congress has put a special emphasis on enforcing the written terms of ERISA welfare benefits plans—such as plans that provide for retiree healthcare benefits, *see Tackett*, 135 S. Ct. at 933. "[F]ocus on the written terms of the plan is the linchpin of a system that is not so complex that administrative costs, or litigation expenses, unduly discourage employers from offering ERISA plans in the first place." *Heimeshoff v. Hartford Life & Acc. Ins. Co.*, 134 S. Ct. 604, 612 (2013) (brackets and internal quotation marks omitted). By "assuring a predictable set of liabilities," Congress meant to "induc[e] employers to offer benefits," *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002), despite not requiring them to do so, *Conkright*, 559 U.S. at 516.

B. Sixth Circuit Decisions Reached After *Tackett* Undermine Predictability and Attach Enormous Risks to Collectively Bargained Retiree Healthcare Benefits.

The decision below undermines predictability and uniformity by creating a circuit split between the Sixth Circuit and the rest of the country. *See* Pet. 18–19. Here, as well as in *Kelsey-Hayes*, the Sixth Circuit resurrected the *Yard-Man* inferences, used them to find a collective bargaining agreement ambiguous, and relied on extrinsic evidence to find a right to lifetime healthcare benefits nowhere mentioned in the

plain text of the contract. As Judge Sutton explained, "every other circuit in the country" would have reached a different result—namely, that the contract unambiguously limited retiree healthcare benefits to the duration of the agreement. *Reese*, 854 F.3d at 888 (Sutton, J., dissenting). The Sixth Circuit has thus "abrad[ed] an inter-circuit split" and fallen "out of step" with the rest of the country. *Id.* at 890, 893.

The decision below also creates severe internal confusion within the Sixth Circuit itself. Though it and *Kelsey-Hayes* held that benefits vested for life, other Sixth Circuit cases interpreting similar contracts have followed *Tackett* and held that retiree healthcare benefits *did not* vest for life. *See Gallo*, 813 F.3d at 269–70; *Cole*, 855 F.3d at 699–702. In fact, the decision below, *Kelsey-Hayes*, and *Cole* form a trio of cases all released on April 20, 2017—two going one way, the third going another. The Sixth Circuit *intentionally* released those opinions on the same day, *Kelsey-Hayes*, 872 F.3d at 388 (Gibbons, J., concurring in denial of rehearing en banc), presumably because it was fully aware that those decisions were in irreconcilable conflict, and it wanted to avoid any single decision having first-in-time precedential status over any other. As a consequence, Sixth Circuit case law is now "a mess," *id.* at 390 (Griffin, J., dissenting from denial of rehearing en banc), and the confusion has metastasized through numerous confused district court decisions throughout the circuit, Pet. 24–25.

The Sixth Circuit has proven unwilling or unable to resolve this uncertainty. Parties in all three of the April 20 cases filed petitions for rehearing en banc seeking to bring clarity to Sixth Circuit law. All three

petitions were denied. In a candid opinion, Judge Sutton explained why: though "[a]n intra-circuit split accompanied by an inter-circuit divide followed by lack of conformity to a Supreme Court decision normally warrants en banc review," in these cases, en banc review would likely "lead to nothing gained" as "there is a real possibility that we would not have nine votes for any one ... approach[.]" *Kelsey-Hayes*, 872 F.3d at 390 (Sutton, J., concurring). In the absence of en banc review, only this Court can resolve this inter- and intra-circuit confusion.

Review by this Court is particularly important because the Sixth Circuit's muddled precedents inflict an outsized harm given the number of retiree healthcare cases that are litigated in that jurisdiction. Dissenting from one denial of review en banc, Judge Griffin explained:

> It is no secret that a combination of several factors—including the number of unionized workforces (and retirees) within our Circuit, the various economic downturns in several of the manufacturing sectors that led to corporate restructuring and the cutting of benefits, and our pro-retiree *Yard-Man* inference—has led to the maintenance of numerous retiree healthcare cases within our jurisdiction.

Id. at 392 (Griffin, J., dissenting from denial of rehearing en banc). Covering Michigan, Ohio, Kentucky, and Tennessee, the Sixth Circuit encompasses much of the country's industrial heartland, and is home to many employers, retirees, and union headquarters. As a result, a seemingly

endless stream of retiree healthcare cases have been litigated in that jurisdiction. The problem has been exacerbated by forum shopping: parties who know that the text of their contracts will be read to bar their claims in other circuits have rationally chosen to file suit in the Sixth Circuit whenever possible. One need look no further than this case for an example. Respondents "counter-sued in the Eastern District of Michigan, even though [petitioner] had no employees or facilities within the Sixth Circuit." Pet. 5. Given the Sixth Circuit's geography and parties' temptation to forum shop, it is no surprise that "countless" cases are presently "percolating" in that Circuit's district courts, *see Kelsey-Hayes*, 872 F.3d at 392 (Griffin, J., dissenting from denial of rehearing en banc).

The uncertainty created by the Sixth Circuit's resuscitation of the *Yard-Man* inferences is untenable. Employers now face the very real possibility that the outcome of a case will turn largely on where suit is brought or on which line of Sixth Circuit law a panel chooses to follow. The stakes, moreover, are exceptionally high: A finding of lifetime healthcare benefits can increase costs by hundreds of millions of dollars for employers with even reasonably sizeable retiree populations, imposing a burden for which those employers neither bargained nor prepared, and one that can risk the financial health of entire enterprises. *See* Part I.A.

Faced with such enormous and uncertain risks, present and future companies may rationally choose not to offer retiree healthcare benefits at all, and thus avoid these dangers altogether. *See Conkright*, 559 U.S. at 517 (noting that "a patchwork of different interpretations of a plan" "would introduce

considerable inefficiencies in benefit program operation" and "might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them"). Such a result would undermine "ERISA's policy of inducing employers to offer benefits by assuring a predictable set of liabilities." *Rush Prudential HMO*, 536 U.S. at 379.

This Court's guidance is thus needed to restore the uniform interpretation *Tackett* so clearly sought to impose. By reanimating the *Yard-Man* inferences, the Sixth Circuit has once again clouded retiree healthcare benefits with uncertainty. And by refusing to resolve that uncertainty via en banc review on three recent occasions, with judges going so far as to acknowledge conflict and yet further lament that the Circuit appears unable to agree on a majority view, *Kelsey-Hayes*, 872 F.3d at 390 (Sutton, J., concurring in denial of rehearing en banc), the Sixth Circuit has demonstrated that only this Court can bring predictability to this area of law. The petition for certiorari should accordingly be granted.

II. The Decision Below Contradicts This Court's Recent Decision in *Tackett* and Should be Summarily Reversed.

A. *Tackett* Rejected The *Yard-Man* Inferences And Instructed Lower Courts To Interpret Collectively Bargained Retiree Healthcare Provisions According To Ordinary Contract Principles.

The Sixth Circuit's confusion is not a result of this Court's lack of clarity. In *Tackett*, the Court took pains to reject not just the holding then under review, nor even just *Yard-Man*'s general theory that courts

should put "a thumb on the scale in favor of" vesting. *Tackett*, 135 S. Ct. at 935. Rather, the Court also examined and rejected a whole series of particularized *Yard-Man* rules of construction, abrogating "the inferences applied by *Yard-Man* and its progeny." *Id.*; *see also id.* at 933 ("[T]he Court of Appeals applied the *Yard-Man* inferences . . . . As we now explain, those inferences conflict with ordinary principles of contract law."); *id.* at 937 ("We reject the *Yard-Man* inferences as inconsistent with ordinary principles of contract law.").

In place of the discredited *Yard-Man* inferences, the Court identified several ordinary principles of contract law to guide interpretation of collective bargaining agreements going forward. *First*, the Court reiterated "the rule that contractual provisions ordinarily should be enforced as written" and that "the written agreement is presumed to encompass the whole agreement of the parties." *Id.* at 933, 936 (internal quotation marks omitted). *Second*, it held that courts must not "refuse[] to apply general durational clauses to provisions governing retiree benefits," but should rather "consider the traditional principle that contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement." *Id.* at 936–37 (internal quotation marks omitted). *Third*, the Court emphasized "the traditional principle that courts should not construe ambiguous writings to create lifetime promises," *id.* at 936, and cited approvingly to authorities requiring "clear and express language" before finding a benefit to have vested for life, *id.* at 937 (quoting *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 400 (6th Cir. 1998)).

B. The Decision Below is Plainly Incorrect Under *Tackett*'s Ordinary Contract Principles.

Application of *Tackett*'s principles should have made "quick work of this case." *Reese*, 854 F.3d at 888 (Sutton, J., dissenting). The parties' 1998 collective bargaining agreement lacked any specific written promise that the company would provide retiree healthcare benefits for life. To the contrary, "the agreement contained a durational clause that limited all of the benefits and burdens of the contract (not otherwise extended or shortened) to the six-year term of the agreement." *Id.* In addition, the contract made expressly clear that the Group Benefit plan—which included retiree healthcare benefits—"run[s] concurrently with" the collective bargaining agreement, far short of commitment for life. *See* Pet. App. 114–115. Under this plain text, the parties unambiguously did not agree to lifetime benefits, and those benefits should have "cease[d], in the ordinary course, upon termination of the bargaining agreement." *Tackett*, 135 S. Ct. at 937.

Yet the Sixth Circuit determined otherwise. Despite no textual indication of intent to permanently vest retiree healthcare benefits, the court held the agreement ambiguous, *Reese*, 854 F.3d at 882–83, and further held that extrinsic evidence "indicate[s] that [petitioner], the retirees, and the retirees' spouses, intended and expected that the healthcare benefits provided were vested for life," *id.* at 883.

The lower court was able to reach that flawed conclusion only by relying upon the same *Yard-Man* inferences that this Court rejected in *Tackett*. *First*, the Sixth Circuit disregarded the contract's general

durational clause. It reasoned that because other provisions of the agreement contained more particular durational clauses, it could not "presume that the general-durational clause . . . says everything about the parties' intentions." *Id.* at 882. The Sixth Circuit deployed similar reasoning in *Kelsey-Hayes*, where it found that "[t]he use of three different types of durational language for specific provisions within the agreement contributes further to the ambiguity." 854 F.3d at 872. This logic is straight from *Yard-Man*, which held that "[v]ariations in language used in other durational provisions of [an] agreement may . . . provide inferences of intent useful in clarifying a provision whose intended duration is ambiguous," 716 F.2d at 1480.

But *Tackett* explicitly rejected "look[ing] to other provisions of [an] agreement" in order to infer from durational limits on different benefits an intent to vest retiree healthcare benefits for life. *See* 135 S. Ct. at 934. It "disagree[d]" that this reasoning is consistent with "ordinary principles of contract law," *id.* at 935, and held that refusal to apply a general durational clause to provisions governing retiree benefits "distort[s] the text of the agreement," *id.* at 936. Judge Sutton later explained that this is because general durational clauses "provide a baseline or default rule" applicable to all provisions in a contract, unless a given provision contains "*more specific limits* relevant to" it. *See Gallo*, 813 F.3d at 271. "Absent a longer time limit in the context of a specific provision, the general durational clause supplies a final phrase to every term in [a collective bargaining agreement]: 'until this agreement ends.'" *Id.* at 269. Thus, the fact that retiree healthcare provisions contain no specific time limitation, while other provisions do, proves only

that the general durational clause applies—not that such benefits are guaranteed for life.

Second, the decision below reasoned that the parties' contract was "silent on whether the benefits continue past the termination date of the agreement," and held that "this silence, rather than resolving ambiguity, furthers it." *Reese*, 854 F.3d at 882. This reasoning too is progeny of *Yard-Man*, which held that "the nature of [retiree] benefits . . . provides another inference of intent" "when the collective bargaining agreement is silent," 716 F.2d at 1482. It is also typical of *Yard-Man*'s successors, which held that when durational limits were silent as to retiree healthcare benefits, they were inapplicable to those benefits. *See, e.g.*, *Noe v. PolyOne Corp.*, 520 F.3d 548, 554 (6th Cir. 2008) (quoting *Yolton v. El Paso Tenn. Pipeline Co.*, 435 F.3d 571, 581 (6th Cir. 2006) ("[A]bsent specific durational language referring to retiree benefits themselves, courts have held that the general durational language says nothing about those retiree benefits.")); *Cole v. ArvinMeritor, Inc.*, 549 F.3d 1064, 1074 (6th Cir. 2008) ("[A] durational limitation must include a specific mention of retiree benefits in order to apply to such benefits.").

Tackett forcefully rejected this reasoning. It explicitly held that "when a contract is silent as to the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life." 135 S. Ct. at 937, and further rejected cases that had "requir[ed] a contract to include a specific durational clause for retiree health care benefits to prevent vesting," *id.* at 936. It explained instead that courts must "consider the traditional principle that [they] should not construe ambiguous writings to create

lifetime promises," *id.*, and noted that "contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement." *Id.* at 937; *cf. Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2133 (2013) (if a significant concession is alleged in a contract, "we would expect a clear indication of such [and] not inscrutable silence").

Third, and finally, the decision below found ambiguity because "healthcare benefits were tied to pension eligibility." *Reese*, 854 F.3d at 882. The court reasoned that this "create[s] an ambiguity about the parties' intentions" and "allows a court to explore the extrinsic evidence to discover what the parties actually intended." *Id.* at 882–83. This strategy arose in *Yard-Man*'s progeny, which routinely relied on the tying of pension and healthcare eligibility as evidence of vesting. *See, e.g.*, *Noe*, 520 F.3d at 558 ("[L]anguage in an agreement that ties eligibility for retiree health benefits to eligibility for a pension indicates an intent to vest the health benefits."); *McCoy v. Meridian Auto. Sys., Inc.*, 390 F.3d 417, 422 (6th Cir. 2005) ("*Yard-Man* recognized an inference that 'status' benefits, including retiree benefits, continue as long as the status is maintained . . . . Because the Supplemental Agreement ties eligibility for retirement-health benefits to eligibility for a pension, in other words, there is little room for debate that the retirees' health benefits vested upon retirement.").

The Court in *Tackett*, however, rejected this inference as well. The Court termed it "inconsistent with ordinary principles of contract law," and singled it out as a way in which "*Yard-Man* and its progeny affected the outcome." 135 S. Ct. at 937. As Judge Sutton later explained:

> *Tackett* rejected this kind of "tying" analysis as a relic of a misdirected frame of reference . . . . It is not surprising that CBAs address pension and healthcare benefits for retirees. And it is not surprising that the CBAs make pensioner status a condition of receiving healthcare benefits. But neither one of these features of the CBAs means that retirees will get those benefits *for as long as* they earn a pension.

Gallo, 813 F.3d at 272.

In short, all of the reasons the Sixth Circuit gave for finding ambiguity in the collective bargaining agreement were explicitly rejected by this Court in *Tackett*. How, then, did the Sixth Circuit justify its departure from this Court's precedent?

The answer appears to lie in what the Sixth Circuit asserts is a difference between "infer[ing] vesting" and "finding ambiguity." *Reese*, 854 F.3d at 882. The court acknowledged that it could "not infer vesting from silence," but nonetheless said it could "find ambiguity . . . partially from . . . silence." *Id.* Similarly, although the court admitted that "[i]nferring vesting from tying alone violates *Tackett*," it declared that "[f]inding an *ambiguity* from tying" "moves us closer to . . . discovering the parties' true intentions." *Reese*, 854 F.3d at 883 (emphasis added). In the court's view, though the *Yard-Man* inferences could no longer create vesting, they could create *ambiguity* about vesting.

But in order for a contract to be ambiguous, there must be "two competing interpretations, both of which are fairly plausible readings of the language." *Id.* at

890 (Sutton, J., dissenting). And inferences that are inconsistent with ordinary principles of contract law are, by definition, incapable of creating such a plausible interpretation. "A forbidden inference cannot generate a plausible reading." *Id.* at 891. And without that plausible alternative reading, the contract in this case cannot be found ambiguous.

The Sixth Circuit's continuing use of *Yard-Man* inferences to find ambiguity in textually plain contracts is thus "*Yard-Man* re-born, re-built, and re-purposed for new adventures," *id.* at 890–91, and it flatly contradicts this Court's jurisprudence.

C. The Sixth Circuit's Clear Error With Respect To Recent Supreme Court Law Warrants Summary Reversal.

Summary reversal is appropriate when the "the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error." *Pavan v. Smith*, 137 S. Ct. 2075, 2079 (2017) (per curiam) (Gorsuch, J., dissenting). It is especially appropriate, moreover, when a court of appeals fails to apply—or balks at fully applying—recent Supreme Court precedent. *See, e.g.*, *Amgen Inc. v. Harris*, 136 S. Ct. 758, 760 (2016) (per curiam) ("consider[ing] for the second time the Ninth Circuit's determination that respondent stockholders' complaint states a claim against petitioner fiduciaries for breach of the duty of prudence" under ERISA, and summarily vacating that determination because "the Ninth Circuit did not correctly apply" the Court's first decision).

Here, despite this Court's clear guidance in *Tackett*, the Sixth Circuit read a collective bargaining agreement as somehow promising retiree healthcare benefits for life despite a clear durational clause and

the absence of any textual indication of lifetime vesting. It did so by using *Yard-Man* inferences that this Court painstakingly rejected and by refusing to apply ordinary principles of contract interpretation that *Tackett* elucidated. Such a clear error warrants this Court's summary reversal.

Summary reversal is necessary, moreover, as the question presented by the petition is both greatly important and unlikely to resolve on its own. So long as Sixth Circuit law remains muddled and in conflict with other circuits, companies within and outside the Sixth Circuit will face the uncertain risk that a panel will impose on them obligations that can cost tens or hundreds of millions of dollars—obligations that they never agreed to bear. And because "there is good reason to fear that a majority . . . would fail to agree on a majority view," *Kelsey-Hayes*, 872 F.3d at 390 (Sutton, J., concurring in denial of rehearing en banc), the Sixth Circuit appears unlikely to resolve this issue itself.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari, summarily reverse the decision below, and remand for judgment to be entered in favor of Petitioners.

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Respectfully submitted,

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